IN THE SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO: 2013/20119

WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED:

In the matter between:

PETER KENNEDY GAIN Applicant

and

MAWELA PROPERTIES PROPRIERTARY LIMITED Respondent

JUDGMENT

SATCHWELL J

1. This is an application for the provisional winding-up of the respondent in terms of section 344(f) of the Companies Act. It is no longer in dispute that respondent is indebted to applicant or that respondent is unable to pay this debt. Instead, respondent has raised two interesting technical defences: that *a pactum de non petendo* with a third party precludes applicant's initiation of these, or any other proceedings and that the matter is *lis pendens* by reason of another trial action.

2. Applicant lent and advanced the sum of R 7 million to respondent during 2007 and two further sums amounting to a further R 7 million. The terms of these loans have been recorded in a detailed loan agreement, Annexure 'A', dated 5th February 2009. Repayment of all these loan amounts was undertaken to be paid in full by the end of June 2009. Respondent has not repaid these loans and respondent is unable so to do by reason of *"certain financial constraints"*[1].

3. Accordingly, there is no doubt that respondent is unable to pay this debt at the present time.

4. The first defence raised by the respondent is that the debt is not due since applicant had entered into a *pactum de non petendo* with one of the directors of the respondent.[2] In essence, respondent claims that the applicant and this director of respondent, Khumalo, agreed *"during June 2009 and May 2009"* that the applicant would *"not claim or institute the amounts in view of the financial constraints of the defendant"*. Applicant undertook not to institute an action against respondent *"pending the successful sale of the foreign mines in which Mr Mzilikazi Godfrey Khumalo had an interest"* it being *"anticipated that the mines would be sold by the end of 2013"*. This *"pact not to litigate until such sale had become effective and where Mr Khumalo had received sufficient monies to pay the loan was done in light of the various problems that Mr Mzilikazi Godfrey Khumalo had experienced....."*[3]. This defence is more succinctly stated in the Answering Affidavit as an undertaking by applicant not to institute action *"pending the successful sale of the foreign mines in which Mr Mzilakazi Godfrey Khumalo had an interest"*.[4]

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[1] Paragraph 6.1 of defendants amended plea and at paragraph 11.1 of respondents Answering Affidavit.
[2] The terms of the pactum are set out by the deponent Mkhwanazi in affidavits in support of the application for condonation in the application to amend the defendant's plea, in opposition to the application for summary judgment and in the answering affidavit to this liquidation application.
[3] At paragraph 6.2 onwards of Defendants amended plea.
[4] Paragraph 11.2 of the answering affidavit.

5. Applicant denies the existence of any such agreement.

6. I see no dispute of fact concerning this alleged *pactum* which even begins to meet the principles set out in Plascon Evans[5]. Indeed I am satisfied that the facts alleged by respondent do not begin to raise *"a real, genuine or bona fide dispute of fact"*.

7. The terms of the alleged *pactum* are neither consistent with past commercial and legal practice concerning this loan nor in accordance with commercial common sense:

    a. Applicant was at pains to procure the loan agreement of February 2009 comprising some nine pages detailing terms and dates of repayment. This suggests that applicant would hardly be prepared to subject the fate of this agreement to an informal, verbal, unrecorded and entirely open-ended *pactum* as alleged.

    b. The terms of the alleged *pactum* allege that applicant agreed that he would not litigate for repayment on an indefinite basis. There is no finite conclusion to this undertaking to wait patiently. There is no postponement of payment to a fixed date. Instead, what is alleged is that legal action can only be initiated once two events have occurred - firstly, the *"sale of foreign mines"* which secondly must be a *"successful sale"*. There is no definition of *'success'* either as to sale price, terms of sale, receipt of funds from the sale. That it was *"anticipated that the mines would be sold by the end of 2013* provides no more than a hope for a *"successful sale"* since it is not averred that the sale must be finally concluded and funds received by the end of 2013. This is a commercially absurd proposition.

    c. The answering affidavit opposing this winding-up liquidation is noticeably silent on the details of this alleged *pactum*. There is no mention of exactly when or where it was concluded and why it was not recorded in writing, the nature and value of the of the "*interest*" which Khumalo has or had in these mines, the location and status of these mines, why (if the mines are in Zimbabwe) they are exempt from any threats of indigenisation, what steps have been taken to procure a sale of these interests as 2013 approaches the calendar year end, whether potential purchasers have indicated any interest or made any offers,

[5] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) 623 AD

the possible sale price which may be achieved for such interests, the terms of any sale. In short, there is no indication whatsoever that there every was or is any prospect of funds emanating from the possible sale of these mining interests which would have induced applicant to agree that he would never pursue his claim against respondent.

8. This alleged *pactum* appears to be an afterthought when one has regard to the correspondence and pleadings which preceded emergence of this defence. The existence of this *pactum* was initially unknown to the director of respondent, Mkhwanazi, who has deposed to all affidavits and apparently given instructions to respondent's legal representatives in this and other litigation.

    a. Summons was issued and served claiming payment of the outstanding amounts during May 2012 . Mkhwanazi, as one of three directors of the respondent, personally wrote [6] to applicant after receipt of summons suggesting a continuation of settlement discussions and setting out a proposal that applicant take over Khumalo's personal residence with respondent to pay the balance owing in cash. The author of the letter must have consulted with Khumalo before offering possession of Khumalo's private residence yet Khumalo apparently failed to inform his co-director of the alleged *pactum* resulting at this time. Indeed the letter went further to state that *"Mzi will in due course be speaking to you about timing of this implementation as it is dependant on a cash transaction to be concluded by the group in due course".* Not only is there no reference to the *pactum* allegedly concluded some three years earlier but there is also clear indication that Khumalo would be discussing the timing of the payment of the balance owing when it is allegedly Khumalo who had already concluded the open-ended *pactum*.

    b. Respondent initially pleaded, as defendant in the civil action, that it *"denied"* the existence of the loans or payment of any monies by applicant to respondent. At that stage of the plea there was no mention of a *pactum* as now set out. The reason given for this denial of the indebtedness and failure to refer to the *pactum* is that, although one of three directors of this company, Mkhwanazi had neither knowledge of the loans or the *pactum* . This is a disconcerting admission because it suggests that this director of the company has either not read the financial statements of the company or that these financial statements fail to correctly record the affairs of the company or that such records are not

[6] Letter of 15th May 2012 at page 194 of pleadings.

kept. It therefore makes it difficult to rely upon any deposition made by this director with regard to respondent's affairs.

9. I have no hesitation in concluding that there is no *pactum de non petendo* which could or would preclude applicant from instituting these or any other proceedings.

10. The second defence raised by the respondent is that of *lis alibi pendens* on the grounds that applicant, as plaintiff, issued summons against respondent, as defendant, under another case number for repayment of the R 15 million. The action is defended and the parties apparently await a trial date.

11. The principle underlying the *lis pendens* defence is to preclude the vexation to a defendant/respondent and to the court of a duplication of litigation in respect of the same subject matter. Either court has a discretion whether or not to uphold such a plea.

12. In the earlier action there is no more than an action for payment of a sum of money whilst in the present application there is an application for the provisional sequestration of the debtor. The relief sought is very different. The consequences of success in the two cases are significantly disparate. The civil action can do no more than bring satisfaction in a monetary amount for this one creditor while the liquidation application may result in an investigation into the affairs of the company and complete or partial satisfaction for a number of as yet unknown creditors. In any event there is authority that *lis pendens* cannot be raised in every case but only where claim is laid to a specific res[7] - that is the position in the civil action but not in the liquidation application.

13. It was argued on behalf of the respondent that this application is an abuse of the court brought because applicant is '*disgruntled*' with lack of success in it's earlier application for summary judgment and that the application should be dismissed, *inter alia*, on this basis. Applicant has justified both forms of litigation – the civil action was instituted to interrupt prescription which this application cannot do whilst the liquidation application is based upon the averment that the company is commercially insolvent.

14. This is certainly not an application brought *in terrorem* of respondent. There is no dispute at all concerning the indebtedness and the inability to pay and there is no *bona fide* dispute about the existence of this *pactum* .

[7] Heywood and Another v BDC Properties Ltd (No 2) [1964] All ER 180 Ch, 185

15. Reference was made in the founding affidavit to other litigation in which Khumalo was been involved which suggest financial difficulties and uncertainties. All of these have been described by respondent as resolved save for the attachment of Khumalo's assets by the Reserve Bank where respondent states *"there is a review of this decision which is currently still before the Court"*[8]. Such review has apparently not yet been concluded and therefore Khumalo's assets still remain attached. This casts some doubt upon the rescue attempts of Khumalo on behalf of respondent.

16. Respondent further complains that applicant should not confuse the separate legal personae of Khumalo and the respondent. However, it is respondent's case is that Khumalo will meet respondent's obligations to applicant out of his own personal assets - not respondent's assets[9]. The commercial fate of respondent appears to be inextricably bound with that of Khumalo. And, as I have already remarked, there is absolutely no information as to when and how the 'successful sale' of Khumalo's mining interests will rescue respondent.

17. In the result I take the view that this is an appropriate matter for this court to exercise its discretion and grant an order for the winding-up of the respondent.

18. An order is made as follows:

    a. The respondent is hereby placed under provisional winding-up.
    b. All persons who have a legitimate interest are called upon to put forward their reasons why this court should not order the final winding up of the respondent on the 25th day of February 2013 at 10h00.
    c. A copy of this order is be forthwith served on the respondent at its registered office and be published in the Government Gazette and in a daily newspaper which circulates throughout the Witwatersrand.
    d. A copy of this order is to be is to be forthwith forwarded to each known creditor by registered post or by electronically receipted transmission.
    e. Costs of application reserved for return day.

Dated at Johannesburg on this day the 18th of November 2013.

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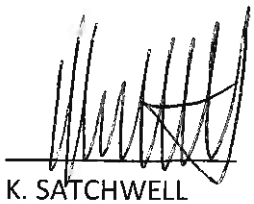
[8] At paragraph 33 of the answering affidavit.
[9] See also the letter proposing settlement of May 2012 proposing that applicant take over Khumalo's personal residence.



K. SATCHWELL

Counsel for Applicant: Adv. A. Subel SC
Counsel for the Respondent: Adv. A. Bava SC
Attorneys for Applicant: Baker & McKenzie
Attorneys for Respondent: Shepstone & Wylie
Date of hearing: 13th November 2013
Date of Judgment:20th November 2013